

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT**

BAP NO. NH 07-005

**Bankruptcy No. 04-14151-JMD and
Bankruptcy No. 04-14152-JMD**

**ROBOTIC VISION SYSTEMS, INC.
(n/k/a ACUITY CiMATRIX, INC.) and
AUTO IMAGE ID, INC.,
Debtors.**

**PAT V. COSTA,
Appellant,**

v.

**STEVEN M. NOTINGER, Chapter 7 Trustee,
ROBOTIC VISION SYSTEMS, INC. (n/k/a ACUITY CiMATRIX, INC.),
AUTO IMAGE ID, INC., UNITED STATES TRUSTEE,
INTEL CORPORATION and MIDDLEFIELD VENTURES LLC.,**

Appellees.

**Appeal from the United States Bankruptcy Court
for the District of New Hampshire
(Hon. J. Michael Deasy, U.S. Bankruptcy Judge)**

**Before
Lamoutte, Votolato, and de Jesús,
United States Bankruptcy Appellate Panel Judges.**

November 1, 2007

Lamoutte, U.S. Bankruptcy Appellate Panel Judge.

This is an appeal by Pat V. Costa (“Costa”),¹ the former Chief Executive Officer and Chairman of the Board of the debtors, Robotic Vision Systems, Inc. and Auto Image ID, Inc. (the “Debtors”), from the bankruptcy court’s order dated January 5, 2007 approving a settlement agreement (“Amended Settlement Agreement”) between the Chapter 7 Trustee (“Trustee”) and Intel Corporation and its subsidiary, Middlefield Ventures Inc. (collectively, “Intel”), secured creditors of the Debtors. Costa argues on appeal that the bankruptcy court’s decision should be overturned for two reasons: first, because the court relied primarily on the recommendations of the Chapter 7 trustee, “who should be accorded no credibility,” and, second, because the court’s approval “facilitates a cover-up crafted by Notinger [the Trustee] and other parties whose intention is to mask the serious damage Intel has inflicted on the Debtor.” Costa’s brief on appeal, as well as his oral argument, expand on the two reasons through conclusory and personal opinions, which reflect his recusancy to accept the court’s decision. However, the arguments fail to address the legal standard to approve the settlement agreement² or the weight of the evidence before the bankruptcy court. For the reasons set forth below, the order approving the Amended Settlement Agreement is affirmed.

¹ Costa is appearing *pro se* in this appeal. However, he was represented by counsel at all relevant times before the filing of the notice of appeal, including the filing of an opposition to the Trustee’s motion to approve the Amended Settlement Agreement, the hearing to consider the contested matter on the approval of the Amended Settlement Agreement, and the filing of a post hearing supplemental objection.

² Costa was clearly put on notice and should know the factors that a court must consider to determine whether an agreement is fair and equitable and in the best interest of the estate, because the same were specified in an opinion entered by the Panel on April 11, 2006, as well as in his opposition to the Amended Settlement Agreement.

BACKGROUND

This is the second appeal concerning the approval of similar settlement agreements. In the first appeal, Costa challenged the provisions of a settlement agreement between the Official Creditors Committee and Intel, a secured creditor of the Debtors (the “First Settlement Agreement”) which paid the settlement proceeds “out of order” to unsecured creditors, allegedly bypassing Costa’s purported junior secured claim in all assets of the Debtors. On April 11, 2006 the Bankruptcy Appellate Panel for the First Circuit (the “Panel”) entered a decision vacating the bankruptcy court’s order approving the First Settlement Agreement, and remanding the matter for further proceedings because the bankruptcy court failed to make adequate findings of fact and conclusions of law. The Panel found that the bankruptcy court failed to make sufficient findings to conclude that the First Settlement Agreement did not offend the Bankruptcy Code’s³ priority scheme and was fair and equitable.

In October, 2005, the Debtors’ bankruptcy cases were converted to Chapter 7, and the Trustee was appointed. In order to avoid the objections raised by Costa to the First Settlement Agreement, the Trustee opted to draft a new agreement (the “Amended Settlement Agreement”) removing the provisions which would have bypassed Costa’s alleged secured claim and paid the settlement proceeds directly to the estate. Both the First Settlement Agreement and the Amended Settlement Agreement essentially provide that the Debtors’ estate will retain approximately \$2 - \$2.5 million dollars from the liquidation of the Debtors’ assets, over which Intel holds a lien on account of a previous loan by Intel and for which Intel will not require repayment, in

³ All references to the “Bankruptcy Code” or to specific sections are to the Bankruptcy Reform Act of 1978, as amended prior to April 20, 2005, 11 U.S.C. § 101, *et seq.*

exchange for a full release of Intel by the Trustee for any claims the Debtors may have against Intel.⁴

Costa objected to the Trustee's motion for approval of the Amended Settlement Agreement with Intel, alleging that the motion "is insufficient to meet the Trustee's burden of proving that the settlement agreement is reasonable and in the best interest of Debtors' estates" and because the Amended Settlement Agreement "remains inadequate as the value of the claims against Intel being given up by the Debtors' estates vastly exceeds the value of the waiver of Intel's prepetition claim." The bankruptcy court held an evidentiary hearing on July 20, 2006 to consider the approval of the Amended Settlement Agreement. The Trustee testified and was cross examined by Costa's counsel regarding the factors he considered in recommending that the Amended Settlement Agreement was in the best interest of the estate. Costa did not present any evidence. The court allowed the parties time to submit post hearing briefs. Costa filed a supplemental objection essentially alleging that he was not afforded reasonable notice of the extent of the evidence that was to be presented at the July 20, 2006 hearing, and, thus, did not have a meaningful opportunity to adequately cross-examine the Trustee. On January 5, 2007, the bankruptcy court issued a detailed order (the "Settlement Order") approving the Amended Settlement Agreement, including a thorough analysis of the relevant factors that the court must consider when approving a settlement agreement. Costa timely appealed.

⁴ Counsel for Intel stated at oral argument that the funds generated by the Amended Settlement Agreement will substantially go to pay the employee claims, as most of the attorneys' fees have already been paid.

JURISDICTION

A bankruptcy appellate panel is duty-bound to determine that it has jurisdiction before proceeding to the merits, even if the issue is not raised by the litigants. See In re George E. Bumpus, Jr. Constr. Co., 226 B.R. 724 (B.A.P. 1st Cir. 1998). A bankruptcy appellate panel may hear appeals from “final judgments, orders and decrees [pursuant to 28 U.S.C. § 158(a)(1)] or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)].” Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). “A decision is final if it ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’” Id. at 646 (citations omitted). A bankruptcy court’s order approving a settlement or compromise is a final order. See Pawtucket Credit Union v. Haase (In re Haase), 306 B.R. 415, 418 (B.A.P. 1st Cir. 2004); Beaulac v. Tomsic (In re Beaulac), 294 B.R. 815, 818 (B.A.P. 1st Cir. 2003).

STANDARD OF REVIEW

Appellate courts generally apply the clearly erroneous standard to findings of fact and *de novo* review to conclusions of law. See TI Fed. Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995); Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.), 43 F.3d 714, 719-20 n.8 (1st Cir. 1994). The approval of a compromise is within the sound discretion of the bankruptcy court, and a reviewing court will not overturn a decision to approve a compromise absent a clear showing that the bankruptcy court abused its discretion. See Jeffrey v. Desmond, 70 F.3d 183, 185 (1st Cir. 1995); see also ARS Brook, LLC v. Jalbert (In re ServiSense.com, Inc.), 382 F.3d 68, 71 (1st Cir. 2004); In re Anolik, 107 B.R. 426, 429 (D. Mass. 1989) (collecting cases).

DISCUSSION

A. Due Process

Bankruptcy Rule 9019(a)⁵ provides that a bankruptcy court may approve a settlement agreement on motion by the trustee and after notice and a hearing. In his post hearing supplemental opposition, Costa claims to have been surprised and subject to trial by ambush when confronted with the evidence presented by the Trustee in support of the approval of the Amended Settlement Agreement. Neither the record nor the applicable law support this argument.

The following facts are undisputed: (1) the Trustee gave notice of his motion for approval of the Amended Settlement Agreement to all parties in interest; (2) the Trustee attached a verbatim copy of the Amended Settlement Agreement to the motion; (3) Costa filed an opposition to the motion; and, (4) the bankruptcy court held an evidentiary hearing to consider the Trustee's motion and Costa's opposition.

Although Costa chose not to brief the due process issue on appeal, and, therefore waived it as a matter of law, Vargas-Ruiz v. Golden Arch Dev., Inc., 368 F.3d 1, 3 (1st Cir. 2004); Iverson v. City of Boston, 452 F.3d 94, 102 (1st Cir. 2006); McCoy v. Massachusetts Inst. of Tech., 950 F.2d 13, 22 (1st Cir. 1991), the Panel agrees that the bankruptcy court correctly found that Costa should not have been surprised with the Trustee's presentation of evidence to establish

⁵ Bankruptcy Rule 9019(a) provides:

On motion by the trustee and after a hearing on notice to creditors, the debtor and indenture trustees as provided in Rule 2002(a) and to such other entities as the court may designate, the court may approve a compromise or settlement.

that the relevant factors required by First Circuit precedent in order to approve a settlement or agreement were satisfied in this case. The Panel reversed and remanded the approval of the First Settlement Agreement for failure to make adequate findings according to the established factors, and indeed this was the very basis for Costa's opposition to the Trustee's motion. The only reason for the scheduled hearing to consider the motion for approval of the Amended Settlement Agreement was to consider evidence and argument on whether or not the required factors were considered and met.

The inclusion of the entire Amended Settlement Agreement to the motion for approval, the fact that Costa opposed the motion, and the fact that a contested hearing was held to consider whether or not the Amended Settlement Agreement should be approved, clearly satisfy the constitutional due process requirements. In re Drexel Burnham Lambert Group Inc., 995 F.2d 1138 (2d Cir. 1993).

B. Factors for Approval of Agreement

Bankruptcy courts consider the following factors when deciding whether to approve a settlement or compromise: (i) the probability of success in the litigation being compromised; (ii) the difficulties, if any, to be encountered in the matter of collection; (iii) the complexity of the litigation involved, and the expense, inconvenience and delay attending it; and, (iv) the paramount interest of the creditors and a proper deference to their reasonable views in the premise. See Jeremiah v. Richardson, 148 F.3d 17, 23 (1st Cir. 1998) (quoting Jeffrey, 70 F.3d at 185) (emphasis added). The court's consideration of these factors should demonstrate whether the compromise is fair and equitable, and whether the claim the debtor is giving up is outweighed by the advantage to the debtor's estate. In re Servisense.com, Inc., 382 F.3d at 71-72.

The bankruptcy court's Settlement Order outlined each of the relevant factors and clearly specified why the Amended Settlement Agreement met each factor and, consequently, should be approved as being fair and equitable and in the best interests of the estate. Because the bankruptcy court's order "articulates a convincing rationale for the decision, there is no need for a reviewing court to wax longiloquent." Vargas-Ruiz, 368 F.3d at 2. Because there is no reasonable or meritorious argument before the Panel to question bankruptcy court's factual findings and conclusions, Costa has failed to show that the bankruptcy court abused its discretion.

C. Waiver of Arguments

Costa's arguments on appeal, which are a visceral attack on the process and procedures leading to the approval of the Amended Settlement Agreement, fail to address either the merits of the evidence arguments presented before the bankruptcy court, or the soundness of the legal basis for the bankruptcy court's decision. In fact, the arguments on appeal do not lucidly address the grounds that Costa himself presented to the bankruptcy court in either his opposition to the motion for approval of the Amended Settlement Agreement or the supplemental opposition.

Moreover, to the extent that Costa's arguments on appeal are an attack on the Trustee's judgment in recommending the approval of the Amended Settlement Agreement, the Panel finds them also to be without merit. Costa had a meaningful opportunity to present evidence at the hearing on approval of the Amended Settlement Agreement. He opted not to do so, even though represented by counsel. The only evidence before the bankruptcy court were the uncontested exhibits, offers of proof and the testimony of the Trustee. The bankruptcy court appropriately gave deference to the Trustee's testimony, In re Mailman Steam Carpet Cleaning Corp., 212 F.3d

632, 635 (1st Cir. 2000), and applied the well-known principle that compromises are favored in bankruptcy. In re Healthco Int'l, Inc., 136 F.3d 45, 50 n.5 (1st Cir. 1998); In re Beaulac, 294 B.R. at 819.

CONCLUSION

In view of the foregoing, the Settlement Order approving the Amended Settlement Agreement is hereby AFFIRMED.